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NO. 87

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

BOB WHITE
Petitioner

v.

THE STATE OF TEXAS
Respondent

PETITION FOR REHEARING BY THE
STATE OF TEXAS

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OF TEXAS.

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May it please the Court:

The State of Texas, respondent in the above cause, acting by and through Gerald C. Mann, its Attorney General, who resides at Austin, Texas, files this its petition for a rehearing herein of the order of this Court of March 25, 1940, and for such says:

1.

Heretofore, on the 25th day of March, 1940, this Honorable Court entered in this cause its order and judgment as follows:

(a) Granted petitioner permission to file a petition for rehearing.

(b) Granted petitioner's petition for a rehearing.

(c) Vacated the order entered in this cause on November 13, 1939.

(d) Granted petitioner the right to proceed in forma pauperis.

(e) Granted the petition for the writ of certiorari.

(f) Reversed the judgment of the Court of Criminal Appeals of Texas and of the trial court.

(g) Ordered the mandate to issue forthwith.

2.

The record before this Court reflects the history of this cause to be:

(a) Petitioner, Bob White, was convicted in the District Court of Montgomery County, Texas, of the capital offense of rape by assault, and his punishment was fixed at death.

(b) From this conviction, appeal was perfected to the Court of Criminal Appeals of Texas, being

the appellate court and court of last resort in criminal cases in said state, which judgment of conviction was in all things affirmed by the said Court of Criminal Appeals of Texas. The opinion affirming the judgment and overruling the motion for rehearing is reported in Vol. 128, Southwestern Reporter, 2nd Series, at Page 51, et. seq. The judgment of the Court of Criminal Appeals of Texas became final on May 17, 1939, when the motion for rehearing was overruled.

(c) On June 6, 1939, petitioner filed in this Honorable Court his petition for the writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas, asserting as grounds therefor race discrimination in the selection and organization of the grand jury which returned the bill of indictment against him and upon which his conviction was predicated.

(d) On November 13, 1939, this Honorable Court dismissed the petition for the writ of certiorari.

(e) On March 19, 1940, or 127 days thereafter, petitioner filed in this Court his petition for leave to file and his petition for a rehearing of the order of November 13, 1939, and either accompanied said petitions with, or made same as a part thereof, what he represented to be a supplemental transcript of the record and a copy of the statement of facts, as filed in and before the Court of Criminal Appeals of Texas.

Note: While counsel for the State of Texas have not seen these petitions, in view of the order of this Honorable Court we assert the fact to be that the petitions for leave to file and for rehearing urged, as a ground for the granting of the writ of certiorari and for the reversal of the cause and judgment of the Court of Criminal Appeals of Texas, a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in admitting in evidence against petitioner, upon the trial of the cause, a confession made by him confessing his guilt of the offense charged, and which confession petitioner charged was unlawfully coerced and forced from him against his will by those having him in custody as a prisoner.

(f) On March 25, 1940, or six days after the filing of the petitions last above referred to, this Honorable Court entered the orders heretofore referred to in Paragraph No. 1 hereof, and reversed the cause, by per curiam opinion, with no reason assigned or opinion delivered as the basis for such order save and except a reference to the case of *Chambers v. Florida*, No. 195, decided February 11, 1940, and *Canty v. Alabama*, No. 634, decided March 11, 1940.

Counsel for respondent recognize and construe such order and citations as sustaining petitioner's contention that the confession so introduced and used against him was obtained in violation of, and constituted a denial of, due process under the Four-

teenth Amendment to the Constitution of the United States.

(g) No representative of the State of Texas was given notice or notified of the filing of the petitions of March 19, 1940. No representative of the State of Texas was notified or given notice that the cause was set for submission or was to be submitted in this Court. No representative of the State of Texas was given the opportunity of being heard in opposition to the petitions so filed by the petitioner, nor to the petition for the writ of certiorari, nor to the petitioner's contentions relative to the admissibility or legality of the confession. In fact, the order of March 25, 1940, was entered without the State of Texas' being first granted the opportunity to be heard upon the issues and questions involved and decided in that order.

3.

Counsel for the State of Texas respectfully but earnestly insist that, under the facts as detailed, the order of this Honorable Court of March 25, 1940, was improvidently entered, as we know that the Court did not intend to overturn a judgment and decree of the court of last resort of our State, without first giving and granting to the State of Texas and its representatives the right and privilege of being heard and of having its day in court.

We respectfully submit that the fact of no notice and no opportunity of being heard are alone sufficient reasons to warrant the State of Texas to ask a rehearing of this cause, to the end that an opportunity of discussing the issues and questions involved may be had.

In this connection, we respectfully submit that the following questions and issues are raised by this record, and upon which the State of Texas desires to be heard, viz.:

(a) The jurisdiction of this Honorable Court to grant the petitioner's petition for rehearing.

(b) The jurisdiction of this Honorable Court to grant the petition for the writ of certiorari.

(c) The jurisdiction of this Honorable Court to determine this cause.

(d) Whether the record reflects that a substantial federal question is raised for this Court's determination.

(e) Whether the record reflects that the decision of, and the disposition made of this cause by, the Court of Criminal Appeals of Texas was based or founded upon any substantial federal question as distinguished from an adequate state question.

(f) Whether the record reflects that in the Court of Criminal Appeals of Texas, in the submission and determination of this cause, there was drawn in question the validity of a statute of the State of Texas as being repugnant to the Constitution or Laws of the United States, and the decision of that court was in favor of the validity of the statute.

(g) Whether the record sustains, as a matter of fact, the conclusion of this Court that the petitioner's confession was obtained in violation of any provision of the Constitution or Laws of the United States.

(h) Whether the record reflects facts which bring this case within the rule announced by this Court in the case of *Chambers v. Florida*, 195, decided February 11, 1940.

(i) Whether the record reflects that the petitioner's confession was obtained or used against him in violation of the statutes of the State of Texas governing the giving, taking, or using of confessions in criminal cases in said state.

(j) Whether a confession made in conformity with the laws and applicable statutes of the State of Texas, governing the making and taking of confessions, and thereafter used by the prosecution upon the trial of the confessor, for an offense confessed or admitted therein constitutes a violation of the due process clause of the Fourteenth Amendment to

the Constitution of the United States, or any other provision thereof.

5.

It is the contention of the State of Texas, and we respectfully submit, that to each and all of the foregoing issues and questions a negative answer is required, warranted and authorized under rules of this Court and the Constitution and Laws of the United States and of the State of Texas.

In support of this contention, the State of Texas and its representatives desire to be heard, and to that end respectfully pray:

- (a) That this petition for rehearing be granted.
- (b) That the cause be regularly set for submission before this Honorable Court, with respondent accorded the right to file brief and to present oral argument in support of its respective contentions.
- (c) That the question of this Court's jurisdiction be reserved and heard along with the case as a whole.
- (d) That upon final hearing the petition for writ of certiorari be dismissed.
- (e) That in the event this Court determines it has jurisdiction of the cause, then upon final hearing that the judgment of the Court of Criminal Ap-

peals of Texas in this cause be in all things affirmed, and that all orders of this Court heretofore made contrary to that conclusion be vacated and set aside.

(f) That the Court having granted petitioner the right to proceed herein in forma pauperis, the record be ordered printed in conformity therewith; or if denied, then that the record be printed at respondent's expense.

6.

Counsel for the State of Texas, respondent herein, hereby certify that this petition for rehearing is presented in good faith and not for delay.

We further certify that, in obedience to the order of this Court of March 25, 1940, and in order that no injury may be done petitioner pending the hearing and disposition of this petition for rehearing, the Court of Criminal Appeals of Texas did, on the 3rd day of April, 1940, make and enter the following order:

"No. 20,188.

"Bob White

Appellant.

"vs.

"The State of Texas,

Appellee.

"ORDER.

"Whereas, on the 22d day of March, 1939 this Court made and entered in the above cause its judgment, order and decree in all things affirming the judgment of the trial court, and

"Whereas, on the 25th day of March, 1940, the Supreme Court of the United States granted the petition of the appellant for a writ of certiorari to review the judgment of this court, and did on the same day enter its judgment reversing the judgment of this court, and the mandate evidencing said order has been received by this court,

"It is therefore ordered and decreed that the execution of the judgment of this court aforesaid be and the same is hereby arrested and the mandate and all proceedings to enforce the judgment of this court and the trial court are hereby stayed until the further order of this court.

"The Clerk of the court is directed to forward to the Warden of the State Penitentiary at Huntsville, Texas, a copy of this order duly certified, for his observance.

"Entered this the 3d day of April, 1940.

"F. L. HAWKINS

"Presiding Judge, Court of Criminal Appeals of Texas."

We represent that J. P. Rogers, Esq., Attorney at Law, of Houston, Texas, is one of counsel for petitioner. We understand that there are other and additional counsel for petitioner, but the names and addresses of these are unknown to counsel for respondent. Their names and addresses are known to, or are on file with the record in the office of, the Clerk of this Court.

This petition for rehearing is in all things respectfully submitted.

GERALD C. MANN
Attorney General of Texas

GEO. W. BARCUS
Assistant Attorney General

LLOYD W. DAVIDSON
State Prosecuting Attorney
Austin, Texas

ATTORNEYS FOR THE STATE
OF TEXAS.

SUPREME COURT OF THE UNITED STATES.

No. 87.—OCTOBER TERM, 1939.

Bob White, Petitioner,
vs.
The State of Texas.

} On Writ of Certiorari to the
Court of Criminal Appeals
of the State of Texas.

[May 27, 1940.]

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was convicted of rape and sentenced to death in the District Court of Montgomery County, Texas. The State's appellate criminal court of last resort affirmed and denied rehearing.¹ We declined to grant certiorari to review the State court's action. February 29, 1940, petitioner sought rehearing of his petition for certiorari, alleging that his conviction and sentence resulted from proceedings in which the State had utilized an alleged confession in violation of the Due Process Clause of the Fourteenth Amendment. March 25, 1940, we granted certiorari, and reversed the judgment of the state court upon authority of *Chambers v. Florida*, — U. S. —, and *Canty v. Alabama, Id.*, —. The case is before us now on the State's petition for rehearing.²

From the first offer of the alleged confession in evidence at the trial, petitioner has challenged the State's right to utilize it con-

¹ 128 S. W. (2d) 51. A prior conviction was reversed. 117 S. W. (2d) 450.

² Petitioner's original petition for certiorari was denied November 13, 1939. On February 29, 1940, after our decision in the *Chambers* case, petitioner filed a petition for rehearing of his original petition, assigning the additional ground that his conviction was attributable to the use by the State of a confession obtained by coercion and intimidation. March 2, 1940, the Attorney General of Texas was notified of the pendency of the petition for rehearing and he has informed the Clerk of this Court that he notified the State's Appellate Criminal Attorney. Information of pendency of the petition for rehearing of the petition for certiorari was also communicated to the Montgomery County District Court Clerk, the District Attorney, the Governor and the State Board of Pardons and Paroles. The State's petition for rehearing of our judgment of March 25, 1940, reversing the State court's judgment, alleged that the State had not received adequate notice and sought further opportunity to present the State's views. We therefore heard oral arguments upon the State's petition for rehearing.

sistently with rights guaranteed him by the Federal Constitution.³ In affirming the conviction and sentence of death, the court below necessarily determined that use of the confession did not constitute a denial of that due process which the Fourteenth Amendment guarantees.

The State suggests that there is evidence that petitioner denied ever having made or signed the confession which purported to be signed by his mark. Therefore, it insists that petitioner is barred from urging that the prosecution's use of the confession could have deprived him of due process at his trial. But regardless of petitioner's testimony on this question, the State insisted and offered testimony to establish that the confession was signed by him and upon this evidence the confession was submitted to the jury for the purpose of obtaining his conviction. Since, therefore, the confession was presented by the State to the jury as that of petitioner, we must determine whether the record shows that, if signed at all, the confession was obtained and used in such manner that petitioner's trial fell short of that procedural due process guaranteed by the Constitution.

Petitioner is an illiterate farmhand who was engaged, at the time of his arrest, upon a plantation about ten miles from Livingston, Texas. On the day following the crime with which he has been charged, he was called from the field in which he was picking cotton and was taken to the house of the brother-in-law of the prosecutrix, the victim of the crime, where fifteen or sixteen negroes of the vicinity were at the time in custody without warrants or the filing of charges. Taken to the county court house, and thence to the Polk County jail, petitioner was kept there six or seven days. According to his testimony, armed Texas Rangers on several successive nights took him handcuffed from the jail "up in the woods somewhere", whipped him, asked him each time about a confession and warned him not to speak to any one about the nightly trips to the woods. During the period of his arrest up to and including the

³In addition to alleging that the confession relied on by the State was coerced and involuntary, both petitioner's amended motion for a new trial and his bill of exceptions to the court below set out that he "was not permitted to talk to an attorney to advise him but was kept incommunicado, was not permitted to use a telephone, was kept in the woods by Rangers a great portion of the time and was denied every right that even this defendant is entitled to under the Constitution of Texas and the Constitution of the United States."

signing of the alleged confession, petitioner had no lawyer, no charges were filed against him and he was out of touch with friends or relatives.

There were denials that petitioner was ever physically mistreated or abused. But the Rangers and a local peace officer, identified by petitioner as the officers who took him on the night trips to the woods and there whipped him, did not specifically deny that he was taken out of jail, at night, and interrogated in the woods. This local peace officer wasn't sure "how many times" the prisoner was removed from jail, and one Ranger re-stated his testimony given at the first trial that he "took him out so many times" the exact number could not be recalled. The prisoner was taken out of jail, driven "out on the road" and then "out off of the road", as this Ranger testified, in order that the officers could talk to him and because the jail was crowded. In jail, the Sheriff put petitioner by himself and "kept watching him and talking to him."

Before carrying petitioner to Beaumont, where the alleged confession was taken, the Sheriff talked about an hour and a half with him. The Rangers who had been taking petitioner to the woods at night knew the county attorney was going to Beaumont to get a statement; they, too, went there and were in and out of the eighth floor room of the jail in Beaumont, with the elevator locked, where petitioner was interrogated from approximately 11:00 P. M. to 3:00 or 3:30 A. M. The alleged confession was reduced to writing after 3 A. M. Immediately before it was taken down, the prisoner was repeatedly asked by the private prosecutor whether he was ready to confess. Petitioner then began to cry, and the typing of the confession, upon which the State's case substantially rested, was completed by the county attorney about daylight. Two citizens of Beaumont signed it as witnesses.

"Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."⁴

The State's petition for rehearing is denied.

⁴Chambers v. Florida, — U. S. —, —; Canty v. Alabama, — U. S. —.